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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

The Chickasaw Nation and The Choctaw Nation,
Petitioners,

v.

United States,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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CONSENT OF PARTIES

Petitioner, and respondent have consented to the filing of this brief, *amici curiae*.[1]

INTEREST OF THE *AMICI CURIAE*

Amici is a federally recognized Indian tribal government and has a vital interest in the legal issues that affect tribal self-government and sovereignty. Of obvious concern to *amici* are the tax ramifications against Indian governmental gaming based upon the final disposition of the underlying case.

The *amici* tribe's participation in the present case is appropriate because of (1) the impact and affect on *amici* (and its budgeting and self-determination efforts) of the ultimate determination and interpretation of the Indian Gaming Regulatory Act (hereinafter referred to as "IGRA"), (2) *amici's* interest in the continuing viability of long-established Indian canons of construction, (3) *amici's* interest to ensure that the spirit and policy of IGRA is supported by the highest court in the land, and (4) the direct impact on *amici* with regard to federal agency interpretations of other statutes and regulations which may hinder Indian self-determination.

Because of the importance of this issue to Indian tribes, *amici* submit this brief to assist the Court in its resolution of the case.

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[1] Their consents have been filed with the clerk of this Court. This brief was authored by the *amici* by the *amici* and counsel listed on the front cover hereof, and was not authored in whole or in part by counsel for a party. No person or entity, other than *amici curia*, their members, or their counsel, made a monetary contribution to the preparation of this brief.

SUMMARY OF ARGUMENT

1. *Amici* asserts that Section 20(d) of the IGRA exempts Indian tribal governments from federal wagering taxation, to the extent said wagering taxation applies to tribal governments, in the manner that state governments are exempted. *Amici* urges the Court to construe the federal statutory exemptions at bar under principles of construction which have been used in construing exemptions under the Fair Labor Standards Act (a federal statute that does not expressly mention tribal governments).

2. *Amici* urges the Court to reject the Respondent's construction of the statutory exemptions at bar, as violating Respondent's authority pursuant to Executive Order 13175 and its predecessors.

3. *Amici* disagrees that gaming activities conducted by tribal governments pursuant to the IGRA are "wagers" within the meaning of 26 U.S.C. Section 4421(1)(C).

4. *Amici* further supports the positions advanced by the Petitioner that: (1) Section 20(D)'s language itself mandates that tribal governments be afforded the same exemptions as are afforded to state governments, (2) to the extent the language is not clear on its face, the legislative history to the IGRA mandates this result, and (3) to the extent the statute is deemed ambiguous, long standing cannons of construction applying federal statutes to tribal governments mandate this result.

ARGUMENT

I. THE STATUTORY EXEMPTIONS AT BAR SHOULD BE CONSTRUED IN A MANNER TO PLACE TRIBAL AND STATE GOVERNMENTS ON PAR, UNDER PRINCIPLES SIMILAR TO THOSE EXTENDING FAIR LABOR STANDARDS ACT EXEMPTIONS TO TRIBAL GOVERNMENTS.

As set forth in section IV below, *amici* agrees (to the extent that the Wagering Statutes at bar apply to tribal governments in the first place) with Petitioner that said statutes, on their face, would exempt tribal governments from taxation to the same extent state governments are entitled to exemption, and agrees that the legislative history to the IGRA, and canons of construction favoring tribal governments, in any event, resolve any such doubts in favor of the Petitioner.

Even if the statutory language and legislative history were not persuasive in this regard, however, *amici* asserts that the Wagering Statutes at hand should nonetheless be construed to place tribal governments on par with state governments under principals similar to those set forth in the Seventh Circuit decision of *Reich v. Great Lakes Indian Game and Wildlife Commission*.[2]

In *Great Lakes*, the Seventh Circuit was asked to construe the applicability of an exemption under the federal Fair Labor Standards Act ("FLSA") for "public law enforcement officers" to "tribal" law enforcement officers. Under Section 29 U.S.C. 207(k) of the FLSA, law enforcement officers of a "public agency" are entitled to certain exemptions from the statute's wage and overtime requirements. Unfortunately, however, that statute does not define "public agency" with reference to tribal governments.[3]

While the Department of Labor (DOL) urged a "literal" interpretation of the statute which would have excluded tribal police from the law enforcement exemption, the Seventh

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[2] 4 F.3d 490 (7th Cir. 1993).

[3] The FLSA defines "public agency" to mean "the government of the United States; the government of a state or political subdivision thereof; any agency of the United States (including the U.S. Postal Service and Postal Rate Commission), a state, or a political subdivision of a state; or any interstate governmental agency." 29 U.S.C. 207(k).

Circuit confirmed that the "plain meaning" cannon urged by the DOL must be reconciled against the canon "that not only treaties but (other) federal statutes as well are to be construed so far as is reasonable to do in favor of Indians."[4]

The Court went on to note that:

> Even literalists, that is to say, acknowledge the applicability to statutes of the principle of contract interpretation that allows the court to seek meaning beneath the semantic level not only when there is an 'intrinsic' ambiguity in the contract but also when there is an 'extrinsic' one, that is, when doubt that the literal meaning is the correct one arises only when one knows something about the concrete activities that the contract was intended to regulate.[5]

In ultimately construing the FLSA law enforcement exemption to include tribal law enforcement officers, the Seventh Circuit noted as follows:

> A literal reading of the Fair Labor Standards Act would create a senseless distinction between Indian police and all other public police. Nothing in the Act alerts the reader to the problem; you have to know that there are Indian police to recognize it. But once it is recognized, the Act, viewed as a purposive, rational document, becomes ambiguous, creating

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[4] *Great Lakes*, 4 F.3d at 493 (citing to *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766-68, 105 S Ct. 2399, 2403-04, 85 L.Ed.2d 753 (1985)).

[5] *Id* at 494.

> room for interpretation. We cannot think of any reason other than oversight why Congress failed to extend the law enforcement exemption to Indian police. . . .[6]

State governments use wagering activities for public purposes, such as road construction and repair, schools, and to fund other public facilities and programs, which ultimately reduce the burden on limited federal assistance. Accordingly, it is easy to see why wagering revenues received by state governments are exempt from federal taxes.

Like state governments, however, tribal governments use wagering activities to fund the public treasury. In fact, tribal governments are arguably more restricted than states (due to IGRA) in the use of wagering revenues for public purposes, and tribal governments have historically been more dependant than state governments on federal funding. Accordingly, the wagering revenues used by tribal governments for self-determination purposes clearly reduce the amount of reliance otherwise burdened upon the federal government and, in fact, do so to a larger extent than that of their state government counterparts.

If the Court were to accept Respondent's arguments, the Chapter 35 wagering taxes would apply solely to <u>private</u> entities, with a single exception (by its alleged silence) with regard to tribal governments. Once you know that tribal governments exist, however, and that tribal governments, like state governments, are authorized to fund governmental activities through wagering activities, the government exemption would "create a senseless distinction" between Indian government and state government.

Under these principles, *amici* urge the Court to construe the statutes at bar in a manner to place tribal governments on par with state governments in this regard.

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[6] *Id.*

II. RESPONDENT'S CONSTRUCTION OF THE STATUTORY EXEMPTIONS AT BAR VIOLATES THEIR AUTHORITY PURSUANT TO EXECUTIVE ORDER 13175.

Executive Order 13175, 65 Fed. Reg. 67249 (November 9, 2000)(replacing Executive Order 13084), requires federal agencies, including the Internal Revenue Service, to construe federal statutory and regulatory requirements with deference to tribal governments, and in a manner designed to promote Indian self-determination. Specifically, the recent Executive Order, Section 2 provides as follows:

> In formulating or implementing policies that have tribal implications, agencies shall be guided by the following principles:
>
> (a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. . . .
>
> (b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependant nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with tribes on a government-to-government basis to address issues concerning Indian tribal self government, tribal trust resources, and Indian tribal treaty and other rights.
>
> (c) The United States recognizes the right of Indian Tribes to self-government and supports tribal sovereignty and self-determination.

Moreover, the Executive Order, Section 5, mandates that federal agencies consult with tribal governments before construing federal statutes or regulations in a manner which would hinder self-determination.

Here, gaming revenues under IGRA activities are expressly limited to purposes which further tribal self-determination. Respondent's construction of the federal wagering statutes at hand, therefore, should be made only after due consultation and consideration of its impact on self-determination. Under the principles set forth in the above Executive Order, to the extent there is an ambiguity in the exemption at bar, the Respondent's should be required to resolve that ambiguity in favor of the tribe.

III. THE PURCHASE OF A PULL-TAB CARD OFFERED BY A TRIBAL ENTITY DOES NOT CONSTITUTE A "WAGER" AS DEFINED IN 26 U.S.C. § 4421(1)(C), BECAUSE INDIAN GAMING OPERATIONS ARE NOT CONDUCTED "FOR PROFIT".

In addition to the ambiguities of IGRA Section 20(d), purporting to incorporate Chapter 35 of the Internal Revenue Code (the Wagering Statues), Chapter 35 itself is fraught with ambiguity. As demonstrated below, the intent and application of Chapter 35 appears directed to commercial gaming activities rather than governmental gaming activities. There is no evidence that the drafters of the Wagering Statutes contemplated Indian gaming activities. Accordingly, *amici* disagrees that the pull-tab activities at issue constitute "wagers" under the wagering taxation statutes at hand. 26 U.S.C. § 4421 defines a "wager" as follows:

> (1) wager – The term "wager" means –
>
> (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,
>
> (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted ***for profit***, and
>
> (C) any wager placed in a lottery conducted ***for profit***. (emphasis added).

As this Court is well aware, Indian governments operate gaming activities to derive revenue for governmental purposes. According to the declaration of purposes section stated by Congress, one of the primary purposes to enact IGRA was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and ***strong tribal governments"*** (emphasis added). [7] Indian gaming activities are not "for profit" commercial enterprises that 26 U.S.C. Section 4401 (the "Wagering Statute") seeks to target.

Thus, implementation of the federal wagering excise tax on tribal gaming operations will tax "tribal governmental" revenue in a manner contrary to both the spirit and purpose of IGRA and the federal Wagering Statute. The Ninth Circuit, in fact, addressed the issue of the purpose and aim of the Wagering Statute in *United States v. D.I. Operating Co.*[8] and construed the reference of "for profit" in Section 4421(1)(B) as for a "commercial purpose".

> The committee reports accompanying the [Wagering Statute] reveal that it was intended to make '**commercialized gambling**' help meet the 'present need for increased revenue, especially at a time when many consumer items of a semi-necessity nature are being called upon to bear new or additional tax burdens.' (emphasis added)[9]

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[7] 28 U.S.C. § 2702 (1988).

[8] 362 F.2d 305 (1966).

[9] *Id.* at 308 (quoting H.Rep. No. 586, 82d Cong., 1st Sess., p. 55(1951-2 Cum.Bull. 357, 397); S.Rep. No. 781, 82d Cong., 1st Sess., p. 113 (1951-2 Cum.Bull. 458, 539).

The *D.I.Operating Co.*, case also recognized that "[t]he phrase 'conducted for profit' is not so clear and unambiguous as to be closed to construction."[10] As set forth above, ambiguities should be construed in favor of tribal governments. Thus, *amici* urges the Court to hold that pull-tab operations conducted by tribal governments (pursuant to the IGRA) are not "wagers" within 29 U.S.C. 4421.

The ambiguity in construing Chapter 35 (the Wagering Statutes) is compounded, rather than removed, by IGRA's purported incorporation of Chapter 35 by parenthetical reference. *Amici* urge the Court to hold that such incorporation is not intended to change the scope of Chapter 35 (i.e., what is a wager).

IV. SECTION 20(D) OF IGRA, WHICH EXPLICITLY REFERENCES SECTION 6050I AND CHAPTER 35 OF THE INTERNAL REVENUE CODE, EXEMPTS TRIBES FROM FEDERAL WAGERING TAXATION.

Finally, to the extent that the wagering statutes apply to tribal governments, *amici* urges the Court to adopt Petitioner's position that the parenthetical language[11] contained in Section 2719(d), and the legislative history thereto, be construed to provide that Indian governmental

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[10] *Id.*, at 309.

[11] Section 2719(d) of IGRA provides:

> (1) The provisions of the Internal Revenue Code of 1986(including sections 1441, 3402(q), 6041 and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

gaming operations would be treated similar to that of state gaming operations.

CONCLUSION

For the foregoing reasons, *amici* requests that the Judgement of the United States Court of Appeals for the Twelfth Circuit be reversed.

Respectfully Submitted,

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